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NO. 732

IN THE

Supreme Court of the United States

OCTOBER TERM 1968

JAMES BRYSON MARTIN, *Petitioner*

v.

DR. GEORGE J. BETO, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS, *Respondent*

PETITION FOR WRIT OF CERTIORARI

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PETITION FOR WRIT OF CERTIORARI

TO THE HONORABLE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

JAMES BRYSON MARTIN, PETITIONER, prays that a Writ of Certiorari be issued to review the Judgment of the United States Court of Appeals for the Fifth Circuit rendered against him on June 18, 1968 in "Martin v. Beto", No. 24,672, Rehearing denied August 14, 1968, and the Judgment of the Court of Criminal Appeals of Texas rendered against him on January 6, 1965, styled "James Bryson Martin v. States of Texas". Petitioner's First Motion for Rehearing was overruled on February 17, 1965.

CITATIONS TO OPINIONS BELOW

The opinions of the Court of Criminal Appeals of Texas in the above entitled cause are reported in 395 S.W.2d 631 and 395 S.W.2d 635. Petition for Writ of Certiorari was denied by the Supreme Court of the United States on November 22, 1965, in "Martin v. Texas", Misc. No. 149, the Memorandum of Mr. Chief Justice Warren is reported in 382 U.S. 928, 86 S.Ct., 307, 15 L.Ed.2d 340. Petitioner thereafter filed a Motion to Vacate the Judgment in the Court of Criminal Appeals of Texas, which Motion was overruled on December 1, 1965, (said Order is unreported and a copy of said Order is attached hereto and included herein for all purposes as Appendix "A". Petition for Writ of Habeas Corpus was denied by the United States District Court for the Southern District of Texas, Houston Division, on August 22, 1965, in "James Bryson Martin v. Dr. George J. Beto, Director, Texas Department of Corrections", Civil Action No. 65-H-849, and the Memorandum and Order of Judge Allen B. Hannay is reported in 260 F. Supp. 589, (D.C. Tex. 1966). The United States Court of Appeals for the Fifth Circuit on June 18, 1968, affirmed the Judgment of the United States District Court denying the Petitioner's Petition for Writ of Habeas Corpus in "James Bryson Martin v. Dr. George Beto, Director, Texas Department of Corrections", No. 24,672 and reported in 397 F.2d 741, (5th Cir., 1968). Petitioner's Motion for Rehearing was denied on August 14, 1968.

JURISDICTION

The jurisidiction of this Honorable Court is invoked under 28 United States Code, Section 1254(1). The opinions of the United States Court of Appeals for the

Fifth Circuit and the Court of Criminal Appeals of Texas in this cause are in conflict with the Constitution and laws of the United States and the holdings of other United States Courts of Appeals interpreting said Constitution and Laws. The Judgment in this cause became final on February 17, 1965 upon the entry of the Judgment overruling the Motion for Rehearing and upon the rendering of the Order denying Motion for Rehearing in this cause by the United States Court of Appeals for the Fifth Circuit on August 14, 1968.

FIRST QUESTION

Is a State procedure known as a Court of Inquiry (statutory provision authorizing a Justice of the Peace to require attendance of witnesses, to examine witnesses publicly and to require sworn testimony upon penalty of contempt or incarceration) constitutionally deficient where;

(a) Said statute permits the State to circumvent the substantive and procedural provisions of the Bill of Rights;

(b) Said procedure did not provide Petitioner with the same protections to which he is entitled in a criminal prosecution?

SECOND QUESTION

Have the Petitioner's Fourth, Fifth, Sixth and Fourteenth Amendment rights to be free from unreasonable searches and seizures, rights of confrontation and cross-examination, compulsory self incrimination, effective assistance of counsel and due process of law been violated where a State Court conviction was secured by virtue of evidence obtained in a "Court of Inquiry", as follows:

(a) The State statute providing for the Court of Inquiry authorized the issuance of process which enabled the State to secure evidence by virtue of an illegal search and seizure;

(b) The evidence so secured was utilized by the State to secure the indictment and in the criminal trial to secure the conviction of the Petitioner;

(c) In the Court of Inquiry the Petitioner was forced and compelled by process to be a witness and was forced to testify upon penalty of fine and incarceration, thereby being deprived of the right against self incrimination;

(d) At said Court of Inquiry, the Petitioner was denied and deprived of the right of counsel, right of confrontation and cross-examination;

(e) A subpoena duces tecum was issued by said Court of Inquiry, served upon Defendant while in custody and said subpoena duces tecum constituted a general search warrant;

(f) By virtue of the execution of the subpoena duces tecum, the State searched the person, office and safe deposit box of Petitioner, and seized evidentiary matters which were utilized in securing the indictment and conviction of Petitioner?

THIRD QUESTION

Are the provisions of the Fifth and Fourteenth Amendments to-wit: that no person shall be held to answer for a capital or otherwise infamous crime unless upon a presentment or indictment of a Grand Jury, controlling in a State criminal felony proceeding?

FOURTH QUESTION

Is a State criminal procedure constitutionally permissible when measured by the standards of the Fifth, Sixth and Fourteenth Amendments:

(a) Where Grand Jury deliberations were conducted publicly;

(b) Members of the Grand Jury which indicted Petitioner and the petit jury were exposed in depth to extensive, prejudicial, inflammatory, pre-indictment publicity by press, radio and television;

(c) Petitioner was called as an involuntary witness in the presence of some members of the Grand Jury, and;

(d) Subsequently the Grand Jury was reconvened and returned the indictments against the Petitioner?

FIFTH QUESTION

Is a State conviction secured by no compliance with the substantive and procedural requirements of the Fourth, Fifth and Fourteenth Amendments to the Constitution of the United States and Rules 3, 4 and 41 of the Federal Rules of Criminal Procedure unconstitutional and void wherein:

(a) A subpoena duces tecum was utilized as a search and arrest warrant to secure the evidence

(b) Said subpoena duces tecum was issued without probable cause did not contain an affidavit?

SIXTH QUESTION

Do the Fifth, Sixth and Fourteenth Amendments to the Constitution of the United States and Rule 18 of the

Federal Rules of Criminal Procedure require that an accused be given the right "to trial by an impartial jury in the State and District in which the crime was committed"?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The constitutional provisions involved herein are Article 3, Section 2, Clause 3 and the Fourth, Fifth, Sixth and Fourteenth Amendments to the Constitution of the United States and Article 1, Section 10 and Article 3, Section 45 of the Constitution of Texas. The statutory provisions involved herein are Articles 560, 886 and 887, Vernon's Annotated Code of Criminal Procedure of Texas, 1925, and Rules 3, 4, 18 and 41, Federal Rules of Criminal Procedure. Because of their length, the text of all of the foregoing provisions are set forth in Appendix "B".

STATEMENT OF THE NATURE OF THE CASE

I. Procedural History of the Case

The Petitioner, an attorney, was jointly charged with four others by indictment with the offense of bribery. The indictment was returned by a Grand Jury of Harris County, Texas and the case was set for trial in the Criminal District Court Number Five of Harris County, Texas.

The Petitioner filed a Motion to Quash the Indictment in the Criminal District Court Number Five of Harris County, Texas. A hearing was had on the Motion which was in the nature of a Motion to Suppress Evidence, and said Motion was denied. The trial court, on its own motion, and over Defendant's objection, without any evidentiary hearing, changed the venue from Harris County, Texas

to Brazos County, Texas, approximately One Hundred (100) miles from Houston, Texas, under color of Article 560, Vernon's Annotated Code of Criminal Procedure of Texas. The Petitioner was subsequently tried and convicted in Brazos County, Texas, and sentenced to four years in the state penitentiary and a fine of Twenty-Five Hundred Dollars. A certified copy of said hearing is on file with the Clerk as required by Rule 23(1)(f).

Petitioner appealed the conviction to the Court of Criminal Appeals of Texas in Cause Number 37,037. The Court of Criminal Appeals affirmed the conviction on January 6, 1965; this affirmance was followed by Petitioner's Motion for Rehearing which was overruled on February 17, 1965. On February 18, 1965 the Court of Criminal Appeals of Texas stayed the execution of the mandate from said court to allow Petitioner an opportunity to prosecute his Petition for Writ of Certiorari to this Honorable Court. This Honorable Court denied said Petition for Writ of Certiorari on November 22, 1965.

Petitioner filed a Petition for Writ of Habeas Corpus with the United States District Court for the Southern District of Texas which was denied on August 22, 1965. Petitioner perfected his appeal from said denial of his Petition for Writ of Habeas Corpus to the United States Court of Appeals for the Fifth Circuit, which Court affirmed said Memorandum and Order on June 18, 1968.

II. Facts Material to the Questions Presented

Prior to being indicted, but after state authorities had focused their suspicions of guilt upon him (Statement of Facts, pp. 34-36 on Motion to Quash the Indictment), Petitioner, under general subpoena as a witness, was required, under threat of imprisonment for contempt and

by virtue of a subpoena duces tecum issued as a part of the infamous "Court of Inquiry" held by Justice of the Peace W. C. Ragan and District Attorney Frank Briscoe, investigating the so-called "probate scandal" of Harris County, Texas, to produce for the inspection of and retention by the said District Attorney Briscoe, a great volume of Petitioner's books and records. (S.F. pp. 30-33, 43; 69-71 and 146 on Motion to Quash Indictment)

These personal and business records were obtained through the execution of said subpoena duces tecum by state authorities including an investigator in the District Attorney's office, a Deputy Sheriff and an Assistant District Attorney, who accompanied the Petitioner, while under arrest, (S.F. p. 146 on Motion to Quash the Indictment) to his office, home, and bank in their search for and collection of evidence. In the aforesaid "Court of Inquiry"', "a witness had the alternative of testifying or being held in contempt of court and imprisoned until he answered the questions under oath as required by Articles 886 and 887 of the Code of Criminal Procedure of Texas require." (S.F. p. 43 on Motion to Quash the Indictment). All witnesses in said Court of Inquiry, including Petitioner, were denied the right to be represented by counsel; were denied the right to offer any evidence in mitigation, extenuation or defense; were denied the right of cross-examination and confrontation of witnesses; were denied the privilege against self-incrimination, fair trial, due process and all other Constitutional safeguards. (S.F. pp. 34-37 and 85-88 on Motion to Quash the Indictment). Any attorney who attempted to intervene on behalf of any client-witness-suspect was summarily ridiculed, threatened and coerced and the District Attorney of Harris County, Texas stated numerous times in open court that the Court of Inquiry

allowed no participants other than those who were called by the District Attorney; no one could interrogate witnesses except the State of Texas and there was to be no cross-examination or confrontation of witnesses. (S.F. 85-88 Motion to Quash the Indictment).

The District Court in Harris County, Texas and the trial court (trial on the merits) in Brazos County, Texas both overruled all attempts by Petitioner to quash the indictment which was based to a great extent on the evidence obtained as aforesaid and refused to suppress said evidence and declare it inadmissible. (S.F. p. 217 on Motion to Quash the Indictment and p. 150 on trial).

The District Court in Harris County, Texas, after hearing Petitioner's pre-trial Motion to Quash the Indictment and overruling said Motion, took it upon himself to change the venue of the case to Brazos County under authority of Article 560, Vernon's Annotated Code of Criminal Procedure of Texas (S.F. pp. 218-222 on Motion to Quash the Indictment) and although no evidence was ever adduced to support the aforesaid change of venue and the record clearly reflects that in fact, the court changed the venue due to extensive pre-trial publicity and further that the publicity given the Court of Inquiry proceedings was unfavorable to the Petitioner with no mention of impartiality concerning the State of Texas, which is clearly required by the state or the defendant.

Brazos County, Texas is located relatively close to Harris County, Texas and received television, radio and newspaper coverage from and substantially identical to that in Harris County, and was permeated by the news media, by press, radio and television coverage with publicity and the carnival like atmosphere concerning the "Court of Inquiry" proceedings to the same extent as

Harris County. Therefore the same prejudices as a result of publicity that existed in Harris County, existed likewise in Brazos County and the change of venue to Brazos County was improper.

The Court of Criminal Appeals of Texas, as reflected by its opinions referred to and incorporated herein, failed to recognize the serious errors alleged and shown by the Petitioner.

III. Federal Questions Raised in the Trial Court, the Court of Criminal Appeals of Texas, the United States District Court and the United States Court of Appeals for the Fifth Circuit

A. In The Trial Court

Prior to the trial on the merits below, Petitioner filed his Motion to Quash the Indictment which was also in the nature of a Motion to Suppress Evidence.

The District Court in Harris County, Texas overruled said Motion over Petitioner's objection and further on its own motion, the Harris County District Court, over Petitioner's objection, transferred the venue of the case from Harris County, Texas to Brazos County, Texas. The trial court in Brazos County, over proper objection, reaffirmed all actions of the Harris County District Court.

B. In The Court of Criminal Appeals of Texas

The Court of Criminal Appeals of Texas on January 6, 1965 in an opinion delivered by Judge Dice, which opinion was approved by the Court held:

> "Complaint is made to the court's refusal to quash the indictment. Appellant timely filed and presented

> to the court a motion to quash the indictment, in which he alleged numerous reasons why the indictment failed to charge an offense. In the motion, appellant further excepted to the indictment on the ground that it was returned by a grand jury which had before it evidence that had been illegally obtained in a court of inquiry held before Justice of the Peace W. C. Ragan, of Precinct No. One of Harris County, in violation of the Fourth, Fifth, Sixth and Fourteenth Amendments to the Constitution of the United States." 395 S.W.2d 631 at 633.
>
> * * *
>
> "Appellant's attack upon the indictment on the ground that it was returned upon evidence illegally obtained in a court of inquiry is similar to that urged and overruled in *McClelland* v. *State,* (Tex. Cr. App.), 373 S.W.2d 674, where it was held that such was not a ground for quashing an indictment in this state." at 633-634

On the issue of the change of venue on the Harris County court's own motion the Court of Criminal Appeals held:

> "Complaint is also made to the court's action in ordering venue changed to Brazos County. Appellant does not present by either formal or informal bill of exception any facts which refute the court's finding that a fair and impartial trial to both appellant and the state could not be had in Harris County. In the absence of such proof it will be presumed, on appeal, that the court had a basis for such finding, and no error is shown. *Ross* v. *State,* 153 Tex. Cr. R. 312, 220 S.W.2d 137."

The Court of Criminal Appeals of Texas specifically ruled on Petitioner's contention that the trial court erred

in allowing, over proper objection, the introduction of the evidence obtained as the result of the subpoena issued as a part of the Court of Inquiry, holding:

> "We overrule appellant's contention that the court erred in allowing the state to introduce evidence which was unconstitutionally obtained, in violation of his rights under the Fourth, Fifth, Sixth and Fourteenth Amendments to the Constitution of the United States. An examination of the record does not reflect that any illegally obtained evidence was introduced against appellant. The evidence presented against him consisted of the testimony of witnesses and numerous exhibits of bank records which were presented in court under subpoenas issued by the district clerk of Brazos County. No evidence which appellant insists was illegally obtained in the court of inquiry was introduced upon the trial."

In its Opinion on Appellant's Motion for Rehearing, the Court of Criminal Appeals of Texas dealt at some length with Petitioner's contention that the evidence introduced over his objection at the trial was inadmissible as "fruits of the poisonous tree". The Court, through the Honorable Judge W. A. Morrison, stated:

> "In a scholarly manner appellant has attacked our original opinion because we failed to discuss his contention that all evidence as to the Tierra Grande books were introduced over his objection that they were tainted under the 'fruits of the poisonous tree' doctrine so ably announced years ago by the Supreme Court of the United States in *Silverthorne Lumber Company v. United States,* 251 U.S. 385, 40 S.Ct. 182, 64 L.Ed 319. His contention is bottomed upon the assertion that the subpoena duces tecum issued by the Court of Inquiry which made

it possible for the prosecution to secure possession of copies of such records was an illegal process because the Court of Inquiry itself was conducted in an unconstitutional manner.

"The answer to this contention seems to be that both our Civil Courts and this Court have had this question before them and have failed to agree with him.

"While it is true that this writer on Motion for Rehearing in *McClelland v. State,* Tex. Cr. App., 373 S.W.2d 674, expressed his trepidation over the propriety of the manner in which the Court of Inquiry was conducted, and Chief Justice Bell and Justice Coleman expressed their concern over the same matter in *McClelland v. Briscoe,* Tex. Civ. App., 359 S.W.2d 635, no court has held that such procedure reaches constitutional dimensions.

"*Silverthorne, supra,* was a case of search without a warrant and by virtue of an invalid subpoena. Here we have a subpoena duces tecum (itself a process authorized by statute) issued by the Justice of the Peace who was acting pursuant to his authority after having convened the Court of Inquiry which was authorized by Article 886, V.A.C.C.P.; a statute of this State which was first enacted by the Legislature in 1876."

C. In The United States District Court

The evidence submitted in support of Petitioner's Petition for Writ of Habeas Corpus before the United States District Court for the Southern District of Texas, presented evidence supporting violations of the Petitioner's Fourth Amendment rights by virtue of the illegal search and seizure of evidence which was introduced at the Petitioner's trial, which evidence was secured by virtue of illegal subpoenas. The Petitioner further intro-

duced for the Court's consideration the constitutionality of the entire Court of Inquiry statutory procedure and the manner of conducting such proceedings in violation of the Petitioner's Fourth, Fifth, Sixth and Fourteenth Amendment rights. In addition extensive testimony was introduced and the question was raised as to whether the Petitioner received a fair and impartial trial and due process due to the extensive pre-trial publicity resulting from the television, radio and press coverage of the Court of Inquiry proceedings and denial of an impartial Grand Jury by virtue of said pre-trial publicity and the additional factor that several Grand Jurors were present during the Court of Inquiry proceedings.

The Petitioner further raised before the United States District Court the question of whether the Petitioner was entitled to be tried by an impartial jury of the State and District "wherein the crime shall have been committed" as guaranteed by the Sixth Amendment to the Constitution of the United States.

The District Court held that "there was no search and seizure here"; that there is a clear distinction in the range of constitutional permissiveness "between a mere investigatory proceeding on the one hand or a judicial or adjudicatory one on the other"; and therefore the United States District Court held that the Petitioner was not entitled to the same Constitutional rights to which he would have been entitled in a criminal prosecution; that there was no showing of Grand Jury prejudice and that the pre-trial publicity did not deprive the Petitioner of a fair trial and due process, due to the fact that the objectionable television, radio and news paper coverage occurred pre-trial.

D. In The United States Court of Appeals For The Fifth Circuit

The Federal questions raised by the Petitioner in the United States Court of Appeals for the Fifth Circuit were similar if not identical to the questions raised before the United States District Court.

In an opinion delivered by Judge Rives, the Court held that the Petitioner had no standing to complain of the unreasonable search and seizure. The Fifth Circuit indicated that certain evidence, secured by virtue of the subpoena duces tecum issued by the Court of Inquiry, which was seized from the Petitioner, utilized by the prosecution at Petitioner's trial, however due to the fact that the Petitioner did not invoke his Fifth Amendment privilege against self incrimination at the Court of inquiry proceeding, that he was not entitled to claim his Fourth and Fifth Amendment rights in the trial court. The Circuit Court further held that the Petitioner waived his Fifth and Sixth Amendment rights against self incrimination, right of confrontation and cross-examination, effective assistance of counsel, fair trial and due process of law at the trial, due to the fact that he did not unqualifiedly object to such at the Court of Inquiry proceeding.

The Circuit Court further held that the Grand Jury requirements of the Fifth Amendment were not binding upon the States and therefore were dispositive of the Petitioner's complaint of an impartial Grand Jury being tainted by pre-trial publicity and exposure of testimony and evidence not properly before the Grand Jury. In connection with the Petitioner's right to be tried "by an impartial jury in the State and district wherein the crime shall have been committed", the Court held that such

portion of the Sixth Amendment was not applicable to the States. The further holding of the Circuit Court was that the Petitioner was not deprived of a fair and impartial trial due to the adverse publicity at the Court of Inquiry proceeding although recognizing the extensive television, radio and newspaper coverage exposure in a carnival-like atmosphere.

Each of the points raised in this Petition for Certiorari were specifically raised by the record, were briefed, argued and ruled on by the United States Court of Appeals for the Fifth Circuit as more particularly demonstrated by the opinion of the Fifth Circuit, specifically the eight (8) particular questions raised on appeal and the manner that the Court of Appeals ruled thereon; *Martin v. Beto,* 397 F.2d 741, at 744, (5th Cir., 1968).

REASONS FOR GRANTING WRIT OF CERTIORARI

I.

This Honorable Court should grant Certiorari herein due to the fact that the decision below is in conflict with the decision of this Honorable Court in the following particulars:

The Fifth Circuit has held that Articles 886 and 887, Vernon's Annotated Texas Criminal Procedures, authorizing a Court of Inquiry, and the procedure followed pursuant to the Court of Inquiry is not in conflict with the Fourth, Fifth, Sixth and Fourteenth Amendments to the Constitution of the United States. Notwithstanding the facts developed in the case below, that the conviction and procedure in developing the evidence in

this case was identical with the procedure that this Court condemned in *Estes v. Texas,* 381 U.S. 532, 14 L.Ed.2d 543, 85 S.Ct. 1628, reh. den. 382 U.S. 875, 15 L.Ed.2d 118, 86 S.Ct. 18; *Pointer v. Texas,* 380 U.S. 400, 13 L.Ed.2d 923, 85 S.Ct. 1065; *Douglas v. Alabama,* 380 U.S. 415, 13 L.Ed.2d 934, 85 S.Ct. 1074; the only distinction between the facts of the instant case and *Pointer v. Texas, supra,* is the fact that in the instant case the State of Texas proceeded under State statutes which enabled the State to require the attendance of witnesses pre-indictment and to compel the Petitioner to attend and to be subjected to examination by the State in the presence of television, radio and news media, to be denied the right to confer with counsel, to cross-examine and to present witnesses in his own behalf.

The holding of the Court below is to the effect that a suspect in a State proceeding may be required to relinquish his Fourth, Fifth, Sixth and Fourteenth Amendment rights provided that such procedure is supported by a State statute.

This Honorable Court should further grant Certiorari to consider the question of whether a defendant is entitled to effective assistance of counsel at a pre-indictment hearing when the investigation has focused upon the defendant and he has become a suspect. Petitioner submits that the Sixth Amendment is binding upon the States through the Fourteenth Amendment.

This Honorable Court should consider whether the instant case should be interpreted in light of *Miranda v. Arizona,* 344 U.S. 842, 97 L.Ed 655, 73 S.Ct. 55; *Gilbert v. California,* 388 U.S. 263, 18 L.Ed2d 1178, 87 S.Ct. 1951; *United States v. Wade,* 388 U.S. 218, 18

L.Ed.2d 1149, 87 S.Ct. 1926; for the reason that in *Gilbert* and *Wade* the question with which this Court was faced was whether the Defendant was entitled to assistance of counsel in a line-up identification. This Court should consider the question which was not raised in *Pointer v. Texas, supra,* as to whether the Defendant is entitled to effective assistance of counsel at a preliminary hearing, to-wit: a Court of Inquiry, being a preliminary proceeding where the evidence which was later introduced in the trial, was developed in part by cross-examination of the Petitioner.

Petitioner submits that this Honorable Court should determine whether the provisions of the Sixth Amendment to the Constitution of the United States are fully binding upon the States through the Fourteenth Amendment to the same extent that the Sixth Amendment is controlling on the Federal Government and the Federal Courts. *Pointer v. Texas, supra; Gideon v. Wainwright,* 372 U.S. 335, 9 L.Ed.2d 799, 83 S.Ct. 792; *Palko v. Connecticut,* 302 U.S. 319, 82 L.Ed. 288, 58 S.Ct. 149; *Malloy v. Hogan,* 378 U.S. 1, 12 L.Ed.2d 653, 84 S.Ct. 1489; *Murphy v. Waterfront Com. of New York Harbor,* 378 U.S. 52, 12 L.Ed.2d 678, 84 S.Ct. 1594; *Miranda v. Arizona, supra; Garrity v. New Jersey,* 385 U.S. 493, 17 L.Ed.2d 562, 87 S.Ct. 616; *Gilbert v. California, supra; United States v. Wade, supra; Counselman v. Hitchcock,* 142 U.S. 547, 35 L.Ed. 1110, 12 S.Ct. 195; *Klopfer v. North Carolina,* 386 U.S. 213, 18 L.Ed.2d 1, 87 S.Ct. 988; *Washington v. Texas,* 388 U.S. 14, 18 L.Ed.2d 1019, 87 S.Ct. 1920.

Certiorari should further be granted due to the fact that the Court of Criminal Appeals of Texas, as well as the United States Court of Appeals for the Fifth Circuit,

has totally ignored the decision of this Court in *Malloy v. Hogan, supra,* and *Klopfer v. North Carolina,* by denying Petitioner the privilege of protection against self incrimination.

As Justice Black so aptly stated in *Pointer v. Texas, supra,* at 927:

> "In the light of Gideon, Malloy, and other cases cited in those opinions holding various provisions of the Bill of Rights applicable to the States by virtue of the Fourteenth Amendment, the statements made in West and similar cases generally declaring that the Sixth Amendment does not apply to the States can no longer be regarded as the law. We hold that petitioner was entitled to be tried in accordance with the protection of the confrontation guarantee of the Sixth Amendment, and that that guarantee, like the right against compelled self-incrimination, is 'to be enforced against the States under the Fourteenth Amendment according to the same standards that protect those personal rights against federal encroachment.' Malloy v. Hogan, supra, 378 U.S., at 20 (12 L.Ed.2d at 661)."

Judge Rives, writing the opinion for the Fifth Circuit in *Martin v. Beto, supra,* at page 745, indicates that the Justice of the Peace allowed any witness to assert his Fifth Amendment privilege of assistance of counsel, however the Court does not take into consideration that several witnesses called prior to the Petitioner had been held in contempt of court, fined and incarcerated; further that because the Petitioner was a lawyer, the Fifth Amendment requirements were relaxed.

As this Honorable Court further said in *Spevack v. Klein,* 385 U.S. 511, at page 514:

> "We conclude that Cohen v. Hurley should be overruled, that the Self-Incrimination Clause of the Fifth Amendment has been absorbed in the Fourteenth, that it extends its protection to lawyers as well as to other individuals, and that it should not be watered down by imposing the dishonor of disbarment and the deprivation of a livelihood as a price for asserting it."

Certiorari should further be granted for this Honorable Court to make a determination as to whether the holding of this Court in *Spevack v. Klein, supra,* is applicable to the Sixth Amendment rights providing for confrontation of witnesses and effective assistance of counsel to be afforded to lawyers as well as non-lawyers. In the opinion delivered by Mr. Justice Douglas in *Spevack v. Klein,* at page 516:

> "Lawyers are not excepted from the words 'No person . . . shall be compelled in any criminal case to be a witness against himself'; and we can imply no exception. . . . lawyers also enjoy first-class citizenship."

II.

Certiorari should be granted in the instant case because an important question affecting the personal right of privacy and freedom from unlawful searches and seizures under the Fourth, Fifth and Fourteenth Amendments to the Constitution of the United States is involved. The warrant and the procedure utilized to secure the evidence and the ultimate conviction of the Petitioner in this case is identical in form and much more harsh in the application of the facts and circumstances involved in the case of *Boyd v. United States,* 116 U.S. 616, 29 L.Ed. 746,

6 S.Ct. 524. The only distinction between the instant procedure and the *Boyd* conviction was the fact that the process, denominated as a subpoena duces tecum in the *Boyd* case was authorized by a Federal Act and the process utilized in the instant case was wholly unauthorized as a procedure in a state criminal proceeding. In the *Boyd* case this Court held, "that compulsory production of a man's private papers to establish criminal charges against him, or to forfeit his property, is within the scope of the Fourth Amendment to the Constitution in all cases in which a search and seizure would be, because it is a material ingredient and affects the sole object and purpose of the search and seizure." The issues of concern to the Court in the *Boyd* decision involving the interrelationship of the Fourth and Fifth Amendments are graphically demonstrated in the instant case in that the subpoena duces tecum utilized in the instant case required not only the production of the private papers of the Petitioner but also required the Petitioner to appear before the magistrate to testify in response to the subpoena and to produce his private papers as required by the subpoena duces tecum. Thus whatever distinctions may historically be found between the Fourth and Fifth Amendments do not exist in the instant case due to the fact that compliance with the procedures of the Fourth Amendment required compulsory self-incrimination contrary to the Fifth Amendment. Therefore, the protection afforded by the Fourth and Fifth Amendments and controlling on the states through the Fourteenth Amendment were violated by the use of the subpoena duces tecum which in effect failed to satisfy the substantive and procedural requirements of the Fourth, Fifth and Fourteenth Amendments to the Constitution of the United States.

The grave and serious constitutional question which the Petitioner respectfully requests that this Court consider is whether a search and seizure can be justified as constitutional and lawful when said search was conducted by virtue of a subpoena duces tecum issued by the presiding official of a Court of Inquiry and served upon the Petitioner when he was in custody, the search conducted by virtue of said subpoena duces tecum amounted to a general and exploratory search for evidence, in violation of this Court's decision in *United States v. Lefkowitz,* 285 U.S. 452, 76 L.Ed. 877, 52 S.Ct. 420; *United States v. Rabinowitz,* 339 U.S. 56, 94 L.Ed. 653, 70 S.Ct. 430, and said evidence secured from the Petitioner's office, home and safe deposit box was utilized by the prosecution at Petitioner's trial. The Fifth Circuit in *Martin v. Beto, supra,* admits the foregoing, however, said decision disallows to the Petitioner his Fourth Amendment rights against unreasonable searches and seizures based upon said court's reasoning that the Petitioner failed to assert his Fifth Amendment privilege against self-incrimination. The foregoing holding of the Fifth Circuit in the instant case reflects that the Fifth Circuit has evaded the decision of this Honorable Court in *Spevack v. Klein, supra.* This Honorable Court should further consider the question of whether a suspect who is in custody can consent to respond to a subpoena duces tecum considering the facts and circumstances attendant in the instant case. *Bumper v. North Carolina,* ____U.S.____, 20 L.Ed. 797, 88 S.Ct. 1788. The Court below held that due to the fact that the Petitioner did not object to the compliance with the subpoena duces tecum at the Court of Inquiry that he had waived his constitutional guarantees under the Fourth, Fifth, Sixth and Fourteenth Amendments to the Constitution of the United States at the trial on the merits. There

was a Motion to Suppress and Return filed in the trial court which was denied and overruled and all of the evidence illegally secured at the Court of Inquiry was admitted into evidence at the trial over the objections and exceptions of the Petitioner. In essence the decision of the Fifth Circuit below is to the effect that if an individual defendant in either a State or Federal proceeding incriminates himself regardless of the violation of the Fourth and Fifth Amendments such evidence is thereafter forever available to the State or Government regardless of the manner of acquisition. The decision below is in conflict with the decision in this Honorable Court in *Fahy v. Connecticut,* 375 U.S. 85, 11 L.Ed.2d 171, 84 S.Ct. 229. It is well recognized in this age of electronic surveillance and the other sophisticated procedures utilized by both the criminal and those charged with the responsibility of law enforcement that it requires a higher degree of discernment and still a great degree of devotion to fundamental principles to adhere to the constitutional principles which is the foundation of our Government and way of life and it is deemed appropriate that the philosophy exemplified by Justice Black should be scrupulously observed:

> "(I)f we remain faithful to the letter and spirit of the Bill of Rights, gamblers, like others, have a right to invoke its safeguards. It should not be forgotten that breaches opened to get lawless gamblers remain to jeopardize the liberty of the law-abiding." Lewis v. United States, 348 U.S. 419, 425 (1955). 99 L. Ed. 475, 481, 75 S.Ct. 415.

III.

A critical question has been raised of such serious import that this Honorable Court should grant Certiorari

in order to determine whether the Fourth Amendment's protection against unreasonable searches and seizures and the holding in *Mancusi v. DeForte,* ____ U.S. ____, 20 L.Ed.2d 1154, 88 S.Ct. 2120, should be extended where a subpoena duces tecum was directed to the Petitioner personally and as a corporate officer to deliver personal and corporate records which were in his custody and under his personal control at his home, office and safe deposit box. The United States Court of Appeals for the Fifth Circuit has held that the Petitioner, as the officer of a Corporation, had no standing to complain of the unlawful search and seizure of Corporate records due to the fact that said records were personal to the Corporation and therefore the Petitioner had no standing to object to the search, seizure and introduction into evidence of same. *Martin v. Beto,* supra. However, this Honorable Court in *Mancusi v. DeForte,* supra, considered the application of the Fourth Amendment to an official of a Labor Union and Union papers secured from a part of a Union office which the defendant shared with other Union officials.

In *Mancusi,* supra, it was determined that the Appellant spent a considerable amount of time at the Corporation office and that he had custody of the records at the time of the seizure, therefore he is afforded Fourth Amendment protection. At page 1160, the Court further held:

> ". . . [I]t seems clear that if DeForte had occupied a 'private' office in the union headquarters, and union records had been seized from a desk or a filing cabinet in that office, he would have had standing."

Go-Bart Importing Co. v. United States, 282 U.S. 344, 51 S.Ct. 153, 75 L.Ed. 374.

The instant case poses an even stronger violation of the Petitioner's Fourth Amendment rights, for in *Mancusi v. DeForte,* supra, the Defendant, shared his office with other Union officers and in this case the Petitioner had exclusive possession and usage of the area which was searched by the State.

This Court should further consider the conflict between the decision of the Fifth Circuit in *Martin v. Beto,* supra, and the decision of this Honorable Court in *Mancusi v. DeForte,* supra, as to the subpoena duces tecum having been issued by the office of the District Attorney. In *Mancusi,* supra, this Honorable Court stated unequivocably that a subpoena must contain

> "[T]he indispensible condition that . . . . the influences from the facts which lead to the complaint '. . . be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime.' " at page 1161.

In *Martin v. Beto,* supra, the Fifth Circuit stated that the Grand Jury subpoenas, which could be located and introduced, were signed by the foreman of the Grand Jury and followed by initials, which indicated that they were signed by the District Attorney, "on this question the parties have cited no authorities".

IV.

Certiorari should be granted by this Honorable Court to determine if the Grand Jury requirements of the Fifth Amendment are binding upon the States by virtue of the Fourteenth Amendment. *Hurtado v. State of Texas,* 110 U.S. 516, 4 S.Ct. 111, 28 L.Ed. 232.

In the instant case the uncontroverted testimony which was obtained, pursuant to the Grand Jury considering the "probate scandal" in Harris County, Texas, the District Attorney of Harris County convened the Grand Jury in order to hold a Court of Inquiry to gather additional evidence to be presented to the Grand Jury in order to secure indictments against the Petitioner and others. Several members of the Grand Jury were present in attendance at the Court of Inquiry and were exposed to testimony, evidence and other proceedings before the Court of Inquiry. Those Grand Jurors who were not personally present at the pre-trial hearing, were exposed to the testimony induced in the Court of Inquiry proceedings by the massive radio, television and news media coverage throughout such proceedings, as was condemned in *Estes v. Texas*, supra.

This Honorable Court should further consider the grave and serious question as to:

1.) Whether the Petitioner is entitled to an impartial Grand Jury, and;

2.) Whether the publicity in the instant case destroyed the possibility of an impartial Grand Jury.

This Honorable Court has intimated in the past that a defendant is entitled to an impartial Grand Jury; *Lawn v. United States*, 355 U.S. 339, 2 L.Ed.2d 321, 78 S.Ct. 311; *Costello v. United States*, 350 U.S. 359, 100 L.Ed. 397, 76 S.Ct. 406; *Hoffman v. United States*, 341 U.S. 479, 95 L.Ed. 1118, 71 S.Ct. 814; *Hale v. Henkel*, 201 U.S. 43, 50 L.Ed. 652, 26 S.Ct. 370; *Cassell v. State of Texas*, 339 U.S. 282, 94 L.Ed. 839, 70 S.Ct. 629.

This Honorable Court should grant Certiorari to explain its opinion and decision in this area and also to make a determination due to the fact that there is a conflict between the various United States Courts of Appeals, *Gorin v. United States,* 313 F.2d 641, (1st Cir., 1963); *United States v. Kahaner,* (S.D.N.Y.), 204 F. Supp. 921 and the Fifth Circuit in *Estes v. United States,* 335 F.2d 609, (5th Cir., 1964), held that the defendant had no right to an impartial Grand Jury.

This Honorable Court should further explain its holding in *Estes v. Texas,* supra, as to whether massive pretrial publicity, as was held in the *Estes* case, destroyed the Petitioner's right and privilege to an impartial Grand Jury and therefore the instant case could not involve *Beck v. Washington,* 369 U.S. 541, for the reason that in *Beck* the Court was not concerned with television and massive press coverage.

With the growing concern by many Courts, the American Bar Association, the various Bar Associations throughout the nation and the Canons of Ethics, of said Associations, this Honorable Court should clearly state its views concerning pre-trial publicity as affecting and destroying the Petitioner's right to an impartial Grand Jury.

V.

Certiorari should be granted herein because of an important question affecting the personal rights of the individual to enjoy the right to be tried in a State criminal proceeding pursuant to the Sixth and Fourteenth Amendments to the Constitution of the United States. The provisions of the Sixth Amendment providing to the accused the right to a trial "by an impartial jury of the State and

district wherein the crime shall have been committed" is enforceable against the States pursuant to the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States.

This Honorable Court has not yet made a determination as to whether the quoted portion of the Sixth Amendment herein is applicable to the States through the Fourteenth Amendment and should make a determination thereof, *United States ex rel. Chatary v. Nailon,* 211 F. Supp. 676, (E.D. Pa., 1962).

This Honorable Court should also consider whether Article 3, Section 2, Clause 3 of the Constitution of the United States which holds that the trial of the accused "shall be held in the State where the said crimes shall have been committed," is applicable to the States thereby providing that an accused in a State criminal proceeding shall be entitled to the same rights and privileges as an accused in a Federal proceeding and further interpret this Court's decision in *United States v. Johnson,* 323 U.S. 273, 89 L.Ed. 236, 65 S.Ct. 249; *United States v. Cores,* 356 U.S. 405, 2 L.Ed.2d 873, 78 S.Ct. 875.

CONCLUSION

It is respectfully submitted that this Honorable Court should grant Petitioner's Petition for Writ of Certiorari and reverse and remand said cause to the United States Court of Appeals for the Fifth Circuit for action consistent with the opinions of this Court so that there will not be a curtailment of Petitioner's Constitutional guarantees

under the Fourth, Fifth, Sixth and Fourteenth Amendments to the Constitution of the United States.

Respectfully submitted,

WOODY AND ROSEN

CLYDE W. WOODY

MARIAN S. ROSEN
Attorneys for Petitioner,
James Bryson Martin

918 Houston First Savings Bldg.
Houston, Texas 77002
CA 2-9225

CERTIFICATE OF SERVICE

This will certify that copies of the foregoing Petition for Writ of Certiorari were served upon Crawford Martin, Attorney General of Texas, Austin, Texas, by depositing the same in the United States mails, properly stamped and addressed, certified mail with return receipt requested.

January 3, 1969

APPENDIX A

IN THE COURT OF CRIMINAL APPEALS OF TEXAS
AUSTIN, TEXAS

No. 37037

JAMES BRYSON MARTIN, *Appellant*

v.

THE STATE OF TEXAS, *Appellee*

APPELLANT'S MOTION TO VACATE JUDGMENT

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918 Houston First Savings Bldg.
Houston, Texas 77002
CA 2-9225

IN THE COURT OF CRIMINAL APPEALS OF TEXAS
AUSTIN, TEXAS

No. 37037

JAMES BRYSON MARTIN, *Appellant*

v.

THE STATE OF TEXAS, *Appellee*

APPELLANT'S MOTION TO VACATE JUDGMENT

To The Honorable Judges of the Court of Criminal Appeals of Texas:

COMES NOW JAMES BRYSON MARTIN, APPELLANT, in the above styled cause, by and through his attorneys of record and moves this Honorable Court to vacate the judgment herein and in support thereof would show unto this Honorable Court the following:

I.

That this Honorable Court delivered its original opinion herein on January 6, 1965. That Appellant's Motion for Rehearing was overruled with written opinion on February 17, 1965. This Honorable Court ordered a stay of the mandate herein on February 18, 1965, to permit Appellant to apply to the Supreme Court of the United States for a Writ of Certiorari.

II.

That Appellant herein, by and through his attorneys of record in the Supreme Court of the United States, timely filed a Petition for Writ of Certiorari in the United States Supreme Court directed to this Honorable Court, on May 17, 1965. No action was taken by the Supreme Court of the United States on said Petition until November 22, A.D. 1965, when Petitioner was notified that said petition had been denied. On November 23, 1965, Petitioner, through his counsel, filed, in the Supreme Court of the United States, his Petition for Rehearing and Application for Issuance of Stay of Order Denying Certiorari.

III.

At the time of the filing of this Motion, this Honorable Court has not issued a mandate in this case.

IV.

Subsequent to the opinions by this Honorable Court herein, on direct appeal, the Supreme Court of the United States has rendered four decisions materially affecting the instant case and the legal basis of this Honorable Court's opinions. These decisions are *Estes v. Texas,* 381 U.S. 532; *Pointer v. Texas,* 380 U.S. 400; *One 1958 Plymouth Sedan v. Pennsylvania,* 380 U.S. 693; and *Griffin v. California,* 380 U.S. 609.

V.

The denial by the Supreme Court of the United States of certiorari in the instant case "imports no expression of opinion upon the merits of the case." *United States v. Carver,* 260 U.S. 482, 490. See also *Brown v. Allen,* 344

U.S. 443, 451-2, 491-2. The Supreme Court of the United States has also said "writs of certiorari are matters of grace. Matters relevant to the exercise of our certiorari discretion frequently result in denials of the writ without any consideration of the merits." *Wade v. Mayo,* 334 U.S. 672, 680. With the increasing case load upon the Supreme Court of the United States, more and more cases must be denied by the Supreme Court, with the expectation that relief will be sought either in some state court remedy such as Appellant seeks herein or in a federal habeas corpus action, which Appellant must seek, should this Honorable Court not grant him the relief to which he is justly entitled. Since this Honorable Court has not had occasion to rule on this case in light of the four Supreme Court decisions referred to above, Appellant asks this Honorable Court to again review its decision herein and to grant him the relief to which he is entitled or at least to rule upon the same in light of the Supreme Court decisions so that when his Petition for Writ of Habeas Corpus is filed in the United States District Court for the Southern District of Texas, Houston, Division, there would be no necessity for a judge of that Court to require that Appellant again come to this Honorable Court as has been the case in *Bertsch v. Texas,* 38,092 and 65-H-34. See also *Ex parte William Leon Owens;* 65-H-35, presently before this Honorable Court, no number having been attached to same by Clerk at this time. In a memorandum noting his dissent to the Court's failure to grant certiorari in the instant case, Chief Justice Earl Warren stated:

> "It is clear that grave constitutional questions are raised by continuing such a proceedings." (citing Estes v. Texas)

The Chief Justice further stated that the Supreme Court's decision "should not be taken in any way as sanctioning the proceedings or of approving of the judgments" of this Honorable Court. The Chief Justice reiterated the Supreme Court's position that certiorari being discretionary, its denial in no way effects the merits of the particular case.

WHEREFORE, Appellant prays that this Honorable Court set this Motion for oral argument and filing of briefs and upon a thorough consideration of the same grant Appellant's Motion to Vacate Judgment herein and for such other and further relief to which he may show himself justly entitled.

Respectfully submitted,

/s/ CLYDE W. WOODY

/s/ MARIAN S. ROSEN
Attorneys for Appellant

(Motion denied. 12/1/65. W. T. McDonald, presiding Judge)

CERTIFICATE OF SERVICE

I, Clyde W. Woody, attorney for Appellant herein, certify that on the 23rd day of November, A.D. 1965, I served a copy of the foregoing Motion upon the Honorable Frank Briscoe, District Attorney of Harris County, Texas, Harris County Criminal Courts Building, Houston, Texas, and upon the Honorable Waggoner Carr, Attorney General of Texas, Capitol Station, Austin, Texas, be depositing an envelope containing such copy in the United States Mail, first class postage affixed thereto, return receipt requested, and addressed to each of the aforesaid addresses.

/s/ CLYDE W. WOODY
918 Houston First Savings Bldg.
Houston, Texas 77002
CA 2-9225

[SEAL]

COURT OF CRIMINAL APPEALS OF TEXAS

GLENN HAYNES
Glenn Haynes, Clerk
Court of Criminal Appeals of Texas

APPENDIX B

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

CONSTITUTION OF THE UNITED STATES

Art. 3 § 2, cl. 3
Section 2. Criminal Trial by Jury.

The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury, and such Trial shall be held in the State where the said Crimes should have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.

AMENDMENT [IV.]

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

AMENDMENT [V.]

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of

life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT [VI.]

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

AMENDMENT [XIV.]

SECTION 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

CONSTITUTION OF TEXAS

Art. 1, § 10. Rights of accused in criminal prosecutions

SEC. 10. In all criminal prosecutions the accused shall have a speedy public trial by an impartial jury. He shall have the right to demand the nature and cause of the accusation against him, and to have a copy thereof. He

shall not be compelled to give evidence against himself, and shall have the right of being heard by himself or counsel, or both, shall be confronted by the witnesses against him and shall have compulsory process for obtaining witnesses in his favor, except that when the witness resides out of the State and the offense charged is a violation of any of the anti-trust laws of this State, the defendant and the State shall have the right to produce and have the evidence admitted by deposition, under such rules and laws as the Legislature may hereafter provide; and no person shall be held to answer for a criminal offense, unless on an indictment of a grand jury, except in cases in which the punishment is by fine or imprisonment, otherwise than in the penitentiary, in cases of impeachment, and in cases arising in the army or navy, or in the militia, when in actual service in time of war or public danger. Added Nov. 5, 1918.

Art. 3 § 45. Change of venue in civil and criminal cases

SEC. 45. The power to change the venue in civil and criminal cases shall be vested in the courts, to be exercised in such manner as shall be provided by law; and the Legislature shall pass laws for that purpose.

VERNON'S ANNOTATED CODE OF CRIMINAL PROCEDURE OF TEXAS

Art. 560. [626] [613] On court's own motion

Whenever in any case of felony the judge presiding shall be satisfied that a trial, alike fair and impartial to the accused and to the State, can not, from any cause, be had in the county in which the case is pending, he may,

upon his own motion, order a change of venue to any county in his own, or in an adjoining district, stating in his order the grounds for such change of venue. Acts 1876, p. 274; Const. art 5, sec. 45.[1]

Art. 886. 976, 941 Court of inquiry

When a justice of the peace has good cause to believe that an offense has been, or is about to be, committed against the laws of this State, he may summon and examine any witness in relation thereto. If it appears from the statement of any witness that an offense has been committed, the justice shall reduce said statements to writing and cause the same to be sworn to by each witness making the same; and, issue a warrant for the arrest of the offender, the same as if complaint had been made and filed.

Art. 887. 977, 942. Witnesses refusing to testify

Witnesses summoned under the preceding article who shall refuse to appear and make a statement of facts, under oath, shall be guilty of a contempt of court, and may be fined not exceeding one hundred dollars, and may be attached and imprisoned until they make such statement.

FEDERAL RULES OF CRIMINAL PROCEDURE

Rule 3. The Complaint

The complaint is a written statement of the essential facts constituting the offense charged. It shall be made

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[1] Reference to Constitution, art. 5, § 45, should probably have been to Constitution, art. 3, § 45.

upon oath before a commissioner or other officer empowered to commit persons charged with offenses against the United States.

Rule 4. Warrant or Summons upon Complaint

(a) *Issuance.* If it appears from the complaint, or from an affidavit or affidavits filed with the complaint, that there is probable cause to believe that an offense has been committed and that the defendant has committed it, a warrant for the arrest of the defendant shall issue to any officer authorized by law to execute it. Upon the request of the attorney for the government a summons instead of a warrant shall issue. More than one warrant or summons may issue on the same complaint. If a defendant fails to appear in response to the summons, a warrant shall issue. As amended Feb. 28, 1966, eff. July 1, 1966.

(b) *Form.*

(1) *Warrant.* The warrant shall be signed by the commissioner and shall contain the name of the defendant or, if his name is unknown, any name or description by which he can be identified with reasonable certainty. It shall describe the offense charged in the complaint. It shall command that the defendant be arrested and brought before the nearest available commissioner.

(2) *Summons.* The summons shall be in the same form as the warrant except that it shall summon the defendant to appear before a commissioner at a stated time and place.

(c) *Execution or Service; and Return.*

(1) *By Whom.* The warrant shall be executed by a marshal or by some other officer authorized by law. The

summons may be served by any person authorized to serve a summons in a civil action.

(2) *Territorial Limits.* The warrant may be executed or the summons may be served at any place within the jurisdiction of the United States.

(3) *Manner.* The warrant shall be executed by the arrest of the defendant. The officer need not have the warrant in his possession at the time of the arrest, but upon request he shall show the warrant to the defendant as soon as possible. If the officer does not have the warrant in his possession at the time of the arrest, he shall then inform the defendant of the offense charged and of the fact that a warrant has been issued. The summons shall be served upon a defendant by delivering a copy to him personally, or by leaving it at his dwelling house or usual place of abode with some person of suitable age and discretion then residing therein or by mailing it to the defendant's last known address.

(4) *Return.* The officer executing a warrant shall make return thereof to the commissioner or other officer before whom the defendant is brought pursuant to Rule 5. At the request of the attorney for the government any unexecuted warrant shall be returned to the commissioner by whom it was issued and shall be cancelled by him. On or before the return day the person to whom a summons was delivered for service shall make return thereof to the commissioner before whom the summons is returnable. At the request of the attorney for the government made at any time while the complaint is pending, a warrant returned unexecuted and not cancelled or a summons returned unserved or a duplicate thereof may be delivered by the commissioner to the marshal or other authorized person for execution or service.

V. VENUE

Rule 18. Place of Prosecution and Trial

Except as otherwise permitted by statute or by these rules, the prosecution shall be had in a district in which the offense was committed. The court shall fix the place of trial within the district with due regard to the convenience of the defendant and the witnesses. As amended Feb. 28, 1966, eff. July 1, 1966.

Rule 41. Search and Seizure

(a) *Authority to Issue Warrant.* A search warrant authorized by this rule may be issued by a judge of the United States or of a state, commonwealth or territorial court of record or by a United States commissioner within the district wherein the property sought is located. As amended Apr. 9, 1956, eff. July 8, 1956.

(b) *Grounds for Issuance.* A warrant may be issued under this rule to search for and seize any property.

(1) Stolen or embezzled in violation of the laws of the United States; or

(2) Designed or intended for use or which is or has been used as the means of committing a criminal offense; or

(3) Possessed, controlled, or designed or intended for use or which is or has been used in violation of Title 18, U.S.C., §957.

(c) *Issuance and Contents.* A warrant shall issue only on affidavit sworn to before the judge or commissioner and establishing the grounds for issuing the warrant. If the judge or commissioner is satisfied that grounds for

the application exist or that there is probable cause to believe that they exist, he shall issue a warrant identifying the property and naming or describing the person or place to be searched. The warrant shall be directed to a civil officer of the United States authorized to enforce or assist in enforcing any law there of or to a person so authorized by the President of the United States. It shall state the grounds or probable cause for its issuance and the names of the persons whose affidavits have been taken in support thereof. It shall command the officer to search forthwith the person or place named for the property specified. The warrant shall direct that it be served in the daytime, but if the affidavits are positive that the property is on the person or in the place to be searched, the warrant may direct that it be served at any time. It shall designate the district judge or the commissioner to whom it shall be returned.

(d) *Execution and Return with Inventory.* The warrant may be executed and returned only within 10 days after its date. The officer taking property under the warrant shall give to the person from whom or from whose premises the property was taken a copy of the warrant and a receipt for the property taken or shall leave the copy and receipt at the place from which the property was taken. The return shall be made promptly and shall be accompanied by a written inventory of any property taken. The inventory shall be made in the presence of the applicant for the warrant and the person from whose possession or premises the property was taken, if they are present, or on the presence of at least one credible person other than the applicant for the warrant or the person from whose possession or premises the property was taken, and shall be verified by the officer. The judge or commissioner shall

upon request deliver a copy of the inventory to the person from whom or from whose premises the property was taken and to the applicant for the warrant.

(e) *Motion for Return of Property and to Suppress Evidence.* A person aggrieved by an unlawful search and seizure may move the district court for the district in which the property was seized for the return of the property and to suppress for the use as evidence anything so obtained on the ground that (1) the property was illegally seized without warrant, or (2) the warrant is insufficient on its face, or (3) the property seized is not that described in the warrant, or (4) there was not probable cause for believing the existence of the grounds on which the warrant was issued, or (5) the warrant was illegally executed. The judge shall receive evidence on any issue of fact necessary to the decision of the motion. If the motion is granted the property shall be restored unless otherwise subject to lawful detention and it shall not be admissible in evidence at any hearing or trial. The motion to suppress evidence may also be made in the district where the trial is to be had. The motion shall be made before trial or hearing unless opportunity therefor did not exist or the defendant was not aware of the grounds for the motion, but the court in its discretion may entertain the motion at the trial or hearing.

(f) *Return of Papers to Clerk.* The judge or commissioner who has issued a search warrant shall attach to the warrant a copy of the return, inventory and all other papers in connection therewith and shall file them with the clerk of the district court for the district in which the property was seized.

(g) *Scope and Definition.* This rule does not modify any act, inconsistent with it, regulating search, seizure and the issuance and execution of search warrantst in circumstances for which special provision is made. The term "property" is used in this rule to include documents, books, papers, and any other tangible objects. As amended Dec. 27, 1948, eff. Oct. 20, 1949.

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1968

NO. 732

JAMES BRYSON MARTIN,
Petitioner

v.

DR. GEORGE J. BETO, DIRECTOR,
TEXAS DEPARTMENT OF CORRECTIONS,
Respondent

On Petition for Writ of Certiorari to
The United States Court of Appeals for
The Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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RESPONDENT'S BRIEF IN OPPOSITION

OPINIONS BELOW

The Petition herein seeks to review the decision of the United States Court of Appeals for the Fifth Circuit rendered on June 18, 1968, and reported at 397 F.2d 741. The Court of Appeals affirmed the judgment of the United States District Court for the Southern District of Texas denying Petitioner's Application for Writ of Habeas Corpus, the opinion of the District Court being reported in 260 F.Supp. 589 (1966).

The habeas corpus Petition in federal district court had followed a state appeal to the Texas Court of Criminal Appeals which affirmed Petitioner's state conviction by the Opinion reported in 395 S.W.2d 631.

Review by certiorari was denied by this Court on November 22, 1965, at 382 U.S. 928. Thereafter, as noted above, the federal district proceedings were instituted, relief was denied, the Court of Appeals affirmed, and Petitioner is back before this Court.

JURISDICTION

The jurisdictional requisites would appear to be adequately set forth in the Petition for Writ of Certiorari, although Respondent disputes Petitioner's contention that any rights guaranteed by the United States Constitution have been denied.

QUESTIONS PRESENTED

Petitioner sets out six questions which he asserts are raised by the facts and circumtances of this case. Respondent does not feel that the "Questions" as stated are accurate characterizations of the real issues. Rather, Respondent says that the true questions presented may be capsulated as follows:

1. Is there a constitutional bar to obtaining business corporation records by subpoena, when these records may serve to incriminate an officer of the corporation, but where such records were not, in fact, used in any way to obtain a conviction of the corporate officer?

2. Is an impartial grand jury a constitutional requisite and is this question actually presented by the facts and circumstances of this case, when the grand jury in question indicted Petitioner long after publicity generated by a Court of Inquiry had subsided?

3. Did Petitioner get a fair and impartial trial, and is it constitutionally permissible to change venue to a

locality which is untainted by publicity that was given the case at the situs of the crime charged?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The pertinent constitutional and statutory provisions are listed at page 6 of the Petition and reproduced in Appendix "B" to the Petition.

STATEMENT OF THE CASE

Petitioner was indicted along with four others for unlawfully bribing Clem McClelland, the Probate Judge of Harris County, Texas. A motion for severance was granted and Petitioner was tried individually.

The evidence adduced at the state trial disclosed that it was the duty of the State Judge to appoint administrators, guardians and appraisers for cases filed in the probate court. It was shown at Petitioner's state trial that the Probate Judge favored the Petitioner and his four defendants very strongly in making appointments as appraisers in estates. Moreover, they collected not only the statutory fee of Five Dollars ($5.00) as appraisers but collected additional appraisal fees which were approved by the Probate Judge.

It was further shown that the Petitioner was an incorporator of a corporation known as the Tierra Grande Incorporated. Petitioner, as president of the corporation, opened a bank account in the Citizens State Bank of Houston in the name of Tierra Grande, Inc. The only persons authorized to make withdrawals from the account were Petitioner and Judge McClelland's secretary. While Petitioner and his four co-indictees were acting as appraisers under appointment

by the court, each and all of them made many deposits into the Tierra Grande bank account. During the same period, numerous checks were drawn on the bank account either payable to Judge McClelland or which were shown to be for his benefit.

Investigation into the alleged irregularities in the probate court were begun by a Harris County grand jury which was convened in May of 1962. In June of 1962, the District Attorney asked for the formation of a Court of Inquiry under Articles 886 and 887 of the Texas Code of Criminal Procedure, 1925. Pursuant to the request, Justice of the Peace Ragan of Harris County ordered the convening of a Court of Inquiry. The hearing began on June 14, 1962. Observation is made that the aforementioned articles have been repealed and that a Court of Inquiry can no longer be instituted by a justice of the peace, but must now be constituted under the authority of a state district judge.

However, prior to the swearing in of the May grand jury and prior to the convening of the Court of Inquiry, information concerning irregularities in the operation of the Probate Court had come to the District Attorney's attention. The District Attorney's office also had knowledge of the Tierra Grande Corporation and said Tierra Grande bank account prior to the beginning of the Court of Inquiry.

The Court of Inquiry, as noted above, began on June 14, 1962. Petitioner was subpoenaed to appear before the Court of Inquiry and was directed to produce the records of Tierra Grande, Inc., as the corporation's agent and president. Petitioner consulted with counsel before producing the records and was

permitted to have counsel present during his appearance before the Court. Although Petitioner and other witnesses were compelled to take the stand, they were permitted to exercise the Fifth Amendment privilege against compulsory self-incrimination.

The Court of Inquiry ended on June 18, 1962. The May grand jury, which had begun investigation into the Probate Court irregularities, would, by normal operation of law, have expired three months after its formation or at the end of July, 1962. Its term was, however, extended for three additional months so that it could continue the investigation already begun. It was finally discharged at the end of October, 1962, without returning any indictment against the Petitioner. Nor did the November 1, 1962, grand jury, which was discharged at the end of January, 1963, return an indictment. It was not until April 29, 1963 that an indictment was returned against the Petitioner and the four others, charging bribery of the probate judge, by a grand jury sworn in on February 1, 1963.

On November 15, 1963, the Criminal District Court of Harris County, ordered a change of venue to Brazos County. Petitioner was tried in January of 1964 and the jury returned a verdict of guilty and assessed a sentence of four years imprisonment in the penitentiary. Petitioner began serving his sentence in December, 1965 and was paroled on October 10, 1966. He will have served his sentence completely by March 10, 1969.

ARGUMENT AND AUTHORITIES— REASONS FOR DENYING THE WRIT

The Court Of Inquiry Proceedings Are, In Actuality, Immaterial To A Decision By This Court.

For all the hue and cry in this case concerning the holding of the Court of Inquiry, an analysis of all the facts and circumstances will show that this hearing did not affect any right guaranteed to the Petitioner under the Constitution of the United States.

No evidence that was adduced or discovered at the Court of Inquiry was later used in Petitioner's state trial. Indeed, the only evidence at all in question were the records of the Tierra Grande corporation, and it is true that some of these records were subpoenaed before the Court of Inquiry. However, these records were not used by the prosecution at Petitioner's trial for bribery, partially because the prosecution considered that the records may have been falsified. Nor did the subpoenaed Tierra Grande records furnish any leads that led to discovery of evidence that was used at the trial. The only evidence used that was connected with Tierra Grande was the corporation bank account. This account was known to the state prior to the Court of Inquiry and the bank records used in the state trial were those of the bank, not the Petitioners' records or the records of the Tierra Grande Corporation.

Furthermore, the holding of the Court of Inquiry did not affect the impartiality of the grand jury which later indicted Petitioner. Certainly no showing of this was made below, as required by this Court in *Beck v. Washington,* 369 U.S. 541 (1962). Furthermore, it may make no difference whether the grand jury returning the indictment against the Petitioner was impartial or not.

This Court has consistenly held that there is no constitutional bar preventing a state from dispensing with grand juries in state prosecutions. *Hurtado v. Califor-*

nia, 110 U.S. 516, 538 (1884); *Kennedy v. Walker,* 337 U.S. 901 (1949); *Beck v. Washington,* supra, at pages 549 and 579; *Malloy v. Hogan,* 378 U.S. 1, 4, n. 2 (1964). And as was said in *Beck:*

> "... It may be that the Due Process Clause of the Fourteenth Amendment requires the State, having once resorted to a grand jury procedure, to furnish an unbiased grand jury. Compare Lawn v. United States, 355 U.S. 339, 349-350 (1958); Costello v. United States, 350 U.S. 359, 363 (1956); Hoffman v. United States, 341 U.S. 479, 485 (1951). *But we find that it is not necessary for us to determine this question; for even if due process would require a State to furnish an unbiased body once it resorted to grand jury procedure—a question upon which we do not remotely intimate any view*—we have concluded that Washington, so far as is shown by the record, did so in this case." (Emphasis added.)

It is submitted that when the question of the necessity of grand jury impartiality is squarely presented, the only workable and logical rule that can be promulgated will be one that does not require an unbiased or impartial grand jury. Otherwise, the cases holding that there is no constitutional requirement for a state to use a grand jury may fall, since it can always be charged that a prosecutor bringing a criminal action by information, under a duty to prosecute vigorously, is both biased and prejudiced in favor of the state.

A decision which will not impose an impartiality requirement on the grand jury would be completely and logically sound. All evidence that is submitted to the grand jury which results in the return of an indictment is, in effect, prejudicial evidence. In other words, if the evidence does not prejudice the grand

jury against a person being investigated, no indictment will be returned. It is therefore reiterated that there should be no requirement for an impartial grand jury.

Nevertheless, no necessity exists here to determine whether a grand jury need be impartial. As previously noted, no showing was made that the grand jury was, in fact, not impartial. And more important, as pointed out above in the "Statement of the Case," the grand jury which indicted Petitioner was not the grand jury which was in session during the Court of Inquiry proceeding, and the indictment was not returned until April 29, 1963, some ten (10) months after the conclusion of the Court of Inquiry.

Lastly, the Court of Inquiry proceedings did not deprive Petitioner of a fair trial because of the generation of unfair and unconstitutional pretrial publicity. Petitioner's case was removed from Harris County, where the criminal acts took place and where the Court of Inquiry was held, to Bryan, the county seat of Brazos County, for trial. Bryan is located some 100 miles from Houston and the trial took place in January, 1964, some eighteen or nineteen months after the June, 1962 Court of Inquiry. Surely any inflammatory prejudice resulting from the Court of Inquiry proceedings had long since dissipated. Moreover, no showing was made or attempted below that the Brazos County trial jury was anything other than impartial, and indeed, no such showing could have been made. Cases such as *Estes v. Texas,* 381 U.S. 532 (1965), which presume harm, are inapplicable to the facts of this case where the trial was held eighteen or nineteen months after possible prejudicial publicity, at a point far removed from the asserted publicity.

Respondent reiterates that when stripped of all the embroidery and embellishment begot, nurtured and developed by skillful counsel, the Court of Inquiry proceedings must disappear from this case as any foundation or cornerstone upon which a claim for relief before this Court can be predicated. The procedure, as set up by the Texas statutes in force at the time of this case, may prescribe procedures that are undesirable and even, arguendo, unconstitutional in some circumstances, but this will not entitle Petitioner to relief. The Court of Inquiry procedure must be correlated to some right guaranteed him by the Constitution and no such relationship exists here. Furthermore, the motives of the District Attorney in holding the Court of Inquiry are not material. Only pertinent, is, again, whether the Court of Inquiry proceedings, whether good, bad or indifferent, constitutional or unconstitutional, ultimately caused Petitioner to be unfairly convicted of the offense of bribery in the District Court of Brazos County, Texas. Respondent submits that the conviction was unaffected by the Court of Inquiry and should stand.

1. *The Subpoena Of The Tierra Grande Corporation Records By The Court Of Inquiry Was Constitutionally Permissible And Deprived Petitioner Of No Right Guaranteed By The Constitution.*

As observed above, the Court of Inquiry directed a subpoena duces tecum to Petitioner, as president and agent of Tierra Grande, Inc., directing him to bring the records of the corporation before the Court of Inquiry. This was done and some testimony concerning the records was elicited.

It should first be noted that the general rule is that

corporation records, such as those of Tierra Grande, are not covered by the Fifth Amendment privilege against self-incrimination. *Hale v. Henkel,* 201 U.S. 43 (1905); *United States v. White,* 332 U.S. 694 (1944). See also *McPhaul v. United States,* 364 U.S. 372 (1960). However, it is not necessary to apply the general rule here.

The Tierra Grande records were not used at Petitioner's later bribery trial, and no leads to other evidence were obtained as a result of the Court of Inquiry. The only evidence submitted at Petitioner's later trial that concerned Tierra Grande was the bank account of the corporation which was obtained from the bank itself. This bank account was known to the District Attorney's office prior to the Court of Inquiry hearing. Accordingly, there was nothing incriminatory for the Fifth Amendment to apply to and nothing discovered or seized so as to invoke the provisions of the Fourth Amendment.

2. *While Indictment By A Fair And Impartial Grand Jury Is Not Thus Far Constitutionally Required, The Grand Jury Which Indicted Petitioner Was, In Fact, Fair And Impartial*

That there is no infirmity in the grand jury which indicted Petitioner, has been discussed at length above in the discussion of the impact and effect that the Court of Inquiry had on the grand jury.

To recapitulate, there is presently no constitutional rule requiring states to have grand juries. And, even when a grand jury is provided, there is, as yet, no decision by this Court requiring that the body be impartial.

But in any event, the grand jury that indicted Petitioner cannot be said to have been partial or biased. While Petitioner charges that two grand jurors attended the Court of Inquiry, these were not members of the grand jury which indicted Petitioner. The indictment was returned by another grand jury on April 29, 1963, ten months after the Court of Inquiry ended and after the publicity spawned by the investigation had dissipated.

Lastly, Petitioner failed utterly in showing any bias or prejudice as is required by *Beck v. Washington,* supra. The attack on the grand jury is without merit.

3. *Petitioner Received A Fair And Impartial Trial In Brazos County And Petitioner Has No Constitutional Right To Be Tried In The County Where His Crime Is Committed.*

Heretofore, it has been shown that Petitioner's alleged bribery of the probate judge became known to the district attorney in the spring of 1962. A grand jury, convened in May of 1962, began to investigate the probate court, and, in June of 1962, a Court of Inquiry was held to inquire into the activities of the probate court. The Court of Inquiry produced much newspaper, radio and television publicity.

Later, in April of 1963, Petitioner was indicted for bribery. On November 15, 1963, the Harris County District Court ordered a change of venue on its own motion to Brazos County. Petitioner complains that he has the right to be tried at the situs of the crime and that this right was denied to him.

The common law rule was that an accused had the right to be tried in the county or district where the

crime was committed. *United States v. Nailon,* 211 F. Supp. 677 (E.D. Pa. 1962). The federal rule is to the same effect. *United States v. Johnson,* 323 U.S. 273 (1944); *United States v. Cores,* 356 U.S. 405 (1958). This rule has not, thus far, been held applicable to the states. However, even if the trial situs rule of *United States v. Johnson,* should be applied to states, the change of venue action here was proper. For the *Johnson* rule has been tempered and modified by this Court in rulings which *require* a change of venue to insure a *fair trial.* See *Sheppard v. Maxwell,* 384 U.S. 333, wherein it was said at page 363:

> ". . . But where there is a reasonable likelihood that prejudicial news prior to trial will prevent a fair trial, the judge should continue the case until the threat abates, or *transfer it to another county not so permeated with publicity. . . .*" (Emphasis supplied.)

No constitutional imperfection is present by the change of venue to Brazos County.

CONCLUSION

For the reasons above stated, Respondent says that there is no violation of due process presented. The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Lonny F. Zwierner, Assistant Attorney General of Texas, certify that a copy of the foregoing Respondent's Brief in Opposition was served on the attorney for Petitioner, by depositing same in the United States Mail, postage prepaid, certified mail, addressed to Mr. Clyde W. Woody, 918 Houston First Savings Building, Houston, Texas 77002, on this the __ day of February, 1969.

LONNY F. ZWIENER
Assistant Attorney General